No. 93-578

Supreme Court, U.S.
FILED
OCT 12 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SNAP-ON TOOLS CORPORATION, JAMES GOMENDI and STEVE GULLEDGE,

Petitioners,

v.

WILLIAM C. VETTER and ELAINE LAPOINTE-VETTER,

Respondents.

Petition For A Writ Of Certiorari To The Montana District Court For The Fourth Judicial District, Missoula County, Montana

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, require a state court to stay proceedings when the action before it presents issues referable to arbitration under the Act?

LISTS REQUIRED BY RULES 14.1(b) AND 29.1

Pursuant to this Court's Rules 14.1(b) and 29.1, petitioners certify that the names of all parties to the proceeding in the Montana District Court for the Fourth Judicial District, Missoula County, Montana appear in the caption of the case, that the corporate petitioner has no parent companies, and that its subsidiary companies are wholly owned.

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PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT, MISSOULA COUNTY, MONTANA

Petitioners Snap-on Tools Corporation, James Gomendi and Steve Gulledge, defendants in the Montana District Court for the Fourth Judicial District, Missoula County, Montana and petitioners and appellants in the Montana Supreme Court, respectfully petition this Court to issue a writ of certiorari to the Montana District Court to review the order of that court denying petitioners' motion to stay proceedings pending arbitration in compliance with the terms of the written arbitration agreement between Snap-on and William Vetter, one of the plaintiffs below.

OPINIONS BELOW

The orders of the Montana Supreme Court are not reported and are reproduced at pp. 1a-4a of the Appendix to this Petition (hereinafter "Pet. App."). The opinion of the Montana District Court for the Fourth Judicial District, Missoula County, Montana is unreported and is reproduced at Pet. App. 5a-7a.

JURISDICTION

The Montana Supreme Court dismissed petitioners' appeal in an order entered on August 31, 1993, after having denied petitioners' petition for a writ of supervisory control in an order entered on July 27, 1993. This Court's jurisdiction arises under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Relevant portions of Article VI of the Constitution, and section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, are set out in Pet. App. 20a.

STATEMENT OF THE CASE

A. The Facts

Snap-on Tools Corporation is a manufacturer of high quality hand-tools intended for ultimate sale primarily to professional mechanics. Snap-on markets these tools principally through a nationwide network of several thousand independent distributors who buy tools from Snap-on, take them in specially-fitted vans to places of business where professional mechanics work, and attempt to sell them to the mechanics working there. Messrs. Gomendi and Gulledge were managerial level Snap-on employees at the time of the events in controversy.

On September 11, 1990, William Vetter signed a written Authorized Dealer Agreement and became a Snap-on distributor. Paragraph 11 of that agreement provided for final and binding arbitration to resolve any disputes that might arise between Mr. Vetter and Snap-on or any Snap-on employee:

> RESOLUTION OF DISPUTES—ARBITRATION. Any controversy or dispute arising out of or relating to this Agreement including, but not limited to, any claim by the Dealer concerning the entry into, performance under or termination of this Agreement, any claim against an employee, officer or director of the Company, or any claim of

> breach of the Agreement, shall be submitted to final and binding arbitration as the sole and exclusive remedy for any such controversy or dispute. . . .
>
> The right and duty of the parties to this Agreement to resolve any disputes by arbitration shall be governed exclusively by the Federal Arbitration Act, as amended, and arbitration shall take place according to the rules of the American Arbitration Association.

B. Procedural History

On or shortly before March 3, 1993, Mr. Vetter and Elaine LaPointe-Vetter, his wife, filed suit in the Montana District Court for the Fourth Judicial District, Missoula County, Montana against Snap-on and Messrs. Gomendi and Gulledge. Each of their claims related to alleged acts or omissions committed in the course of inducing Mr. Vetter to become a Snap-on distributor or in the course of performance under the Authorized Dealer Agreement once he became one.[1]

Snap-on and its individual co-defendants promptly filed a motion asking the state court to stay proceedings pending arbitration. Shortly after doing so,

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[1] Specifically, plaintiffs complained that defendants had misrepresented income potential and capital requirements, among other things, "[i]n order to induce Plaintiffs to invest money in a Snap-On [sic] dealership" (Complaint, ¶ 9), that defendants concealed material information about Snap-on dealerships (*id.*, ¶ 12), that defendants interfered with "Plaintiffs' operation of the Snap-On [sic] dealership" while it was under way (*id.*, ¶ 16), and that plaintiffs as a result "were forced into terminating their Snap-On [sic] dealership . . . . " (*Id.*, ¶ 17) *See* Pet. App. 10a-13a.

Snap-on filed a separate action in the United States District Court for the District of Montana, seeking an order compelling Mr. Vetter to proceed to arbitration. Snap-on's federal court motion to compel arbitration has been fully briefed, submitted and awaiting decision since May 14, 1993.

The Vetters resisted petitioners' state court motion on an array of grounds. On May 27, 1993, the state court denied petitioners' stay motion. The state court did not address the merits of the Vetters' defenses to the obligation to arbitrate. The only reason that it gave for denial was that it had discretion to deny the motion.[2] Indeed, even in denying petitioners' alternative motion to dismiss the complaint, the state court said only that "at this stage in the case claims have been stated . . . which *may* not be subject to the arbitration clause . . . ." Pet. App. 7a (emphasis added).

Snap-on and the individual defendants filed a notice of appeal to the Montana Supreme Court and also asked that court for a writ of supervisory control. On

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[2] The district court's statement that petitioners conceded the existence of such discretion (Pet. App. 6a) is mistaken. *See* Pet. App. 8a-9a. Petitioners in fact vigorously insisted that 9 U.S.C. § 3 absolutely required a stay of litigation proceedings between the parties contractually required to arbitrate. *Id.* (These citations are to petitioners' state court brief. Despite repeated requests, the court reporter has thus far been unable to produce a transcript of the oral argument on petitioners' motion.) Petitioners recognized, as this Court has, that whether proceedings should likewise be stayed between *non-arbitrating* parties (*i.e.*, Ms. LaPointe-Vetter and those against whom she had asserted claims) was a discretionary matter. *See generally Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20 n.23 (1983).

July 27, 1993, the Montana Supreme Court declined without opinion to issue a writ of supervisory control. On August 31, 1993, the Montana Supreme Court dismissed the appeal on the ground that it did not have jurisdiction to entertain an interlocutory appeal from an order denying a motion for a stay pending arbitration.

C. This Court's Jurisdiction Under 28 U.S.C. § 1257

Because the Montana Supreme Court declined to review the case, the Montana District Court's judgment is that of "the highest court [in that State] in which a decision could be had" within the meaning of 28 U.S.C. § 1257(1). *See Virginian Railway Co. v. Mullens*, 271 U.S. 220, 221 (1926).

That judgment is also "final" for purposes of § 1257 review for all of the reasons expressed in *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) ("For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate."); *see also Volt Information Sciences, Inc. v. Stanford University Board of Trustees*, 489 U.S. 468, 473 & n.4 (1989).

REASONS FOR GRANTING THE WRIT

Introduction

If 9 U.S.C. § 3 applies in state court, then the decision below is wrong. A § 3 stay of litigation between arbitrating parties is mandatory, not discretionary. *See Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 829-30 (D.C. Cir. 1987); *Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 761 F.2d 855, 862 (2d Cir. 1985). The issue here therefore turns entirely on

whether 9 U.S.C. § 3 is applicable to state-court proceedings.

I. AUTHORITY AMONG THE STATE APPELLATE COURTS AND WITHIN THIS COURT ITSELF IS SPLIT ON THE ISSUE PRESENTED BY THIS PETITION.

Twice in recent years, with sharply conflicting implications about the merits, opinions of this Court have identified in *dicta* the question raised by this petition. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 26 (1983), this Court commented flatly that, "[S]tate courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the [Federal] Arbitration Act." This Court proceeded to explain that:

> Although § 3 [of the Federal Arbitration Act] refers ambiguously to a suit "in any of the courts of the United States," the state courts have almost unanimously recognized that the stay provision of § 3 applies to suits in state as well as federal courts, requiring them to issue the same speedy relief when a dispute is referable to arbitration. . . . This is necessary to carry out Congress' intent to mandate enforcement of all covered arbitration agreements; Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable dispute in federal court, but not against one who sues on the same dispute in state court.

Id., n.34. In *Volt Information Sciences, Inc. v. Stanford University Board of Trustees*, 489 U.S. 468, 477 n.6 (1989), by contrast, this Court pointed out that

it had "never held that §§ 3 and 4 [of the Federal Arbitration Act], which by their terms appear to apply only to proceedings in federal court . . . are nevertheless applicable in state court." *See also Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984) (expressly reserving judgment on question of whether 9 U.S.C. §§ 3 and 4 apply in state court).

Mirroring the divergence implicit in these comments are conflicting results in state appellate courts confronted with the question.

Most state appellate courts that have addressed the issue have held that 9 U.S.C. § 3 applies to proceedings in state court. *See, e.g., Ex Parte Redshaw, Inc.*, 524 So. 2d 367, 369 (Ala. Civ. App. 1987) ("The Federal Arbitration Act . . . requires that a trial court stay judicial proceedings pending before it and enforce the arbitration provisions of the parties' contract when such exist. This requirement applies to proceedings in state, as well as in federal, courts."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 666 S.W.2d 604, 609-610 (Tex. App. 1984) ("It is clear that the issue of arbitrability is governed by a body of substantive federal law applicable in both state and federal court. 'Moreover, state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Federal Arbitration Act. . . . ' ") (*citing and quoting from Moses H. Cone, supra*); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed*, 405 So. 2d 790, 793 (Fla. App. 1981) ("We also hold that the provisions of Section 3 of the Federal Arbitration Act apply to Florida state courts. Section 3 generally requires 'courts of the United States' to stay judicial proceedings upon a showing that the disputes are subject to a valid and enforce-

able arbitration agreement. We feel compelled to interpret the somewhat ambiguous expression 'courts of the United States' to include Florida courts in order to protect the rights created by the Federal Arbitration Act.") (note omitted); and *Allison v. Medicab International, Inc.*, 92 Wash. 2d 199, 597 P.2d 380, 382 (1979) (*en banc*) ("The [Federal Arbitration A]ct also requires that, when pursuant to an arbitration agreement arbitration of a claim has been demanded, any lawsuit 'brought in any of the courts of the United States' involving that claim must be stayed until arbitration has been completed."); *see also Burke County Public Schools Board of Education v. Shaver Partnership*, 279 S.E.2d 816, 823-25 (N.C. 1981) (holding, without directly discussing the applicability of 9 U.S.C. § 3, that the Federal Arbitration Act generally displaces contrary state law in cases involving contracts within scope of FAA, and reversing denial of motion for stay pending arbitration); and *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 23-24, 136 Cal. Rptr. 378, 380-81 (1977) (holding that 9 U.S.C. § 4 is applicable in state court proceedings).

One state appellate court ruling and one published decision of a state trial court, however, have held that 9 U.S.C. § 3 does not apply in state court. In *Madison Beauty Supply, Ltd. v. Helene Curtis, Inc.*, 167 Wis. 2d 237, 244, 481 N.W.2d 644, 648 (Wis. App. 1992), the Wisconsin Court of Appeals recognized that the substantive portions of the Federal Arbitration Act necessarily prevailed over contrary provisions of state law, but held that "§ 3 of the FAA does not apply in state court." Similarly, in *Pullman, Incorporated v. Phoenix Steel Corp.*, 304

A.2d 334, 337-38 (Del. Super. 1973), the court held that the Federal Arbitration Act *in toto* was inapplicable in state court actions.

While the overwhelming weight of pertinent authority is thus contrary to the decision below, existing case law does present some disagreement on an issue that this Court has noted without deciding. Only this Court can provide the definitive guidance called for.

II. THIS ISSUE IMPLICATES POLICY CONCERNS THAT THIS COURT HAS REPEATEDLY IDENTIFIED AS BOTH STRONG AND IMPORTANT.

However this issue is resolved, that resolution will have implications going to the heart of the strong federal policy favoring commercial arbitration—a policy that the Federal Arbitration Act itself emphatically articulates and that this Court has repeatedly endorsed. *See* 9 U.S.C. § 2; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("The [Federal] Arbitration Act . . . establishes a 'federal policy favoring arbitration' [citing case], requiring that we rigorously enforce agreements to arbitrate."); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)(referring to Federal Arbitration Act's declaration of a "liberal federal policy favoring arbitration.").

Recognition and enforcement of this policy is encouraging arbitration, as it was intended to. The American Arbitration Association reports that commercial arbitration demands filed with it went from 6,777 in 1984 to 12,220 in 1989—an 80% increase. While it is impossible to say how many of those filings involve actual or potential state court litigation, this Court has recognized that "enforcement of the [Federal Arbitration] Act is left in large part to the state

courts . . . ." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983). Given the limited character of federal jurisdiction and the ease with which plaintiffs can block diversity, state courts will inevitably play a pivotal role in effectuating or defeating this important federal policy in a large percentage of these cases.

As this Court has recognized, the central purpose of the Federal Arbitration Act was to negate long-standing judicial and common law hostility to commercial arbitration, and to make such arbitration the speedy and inexpensive dispute-resolution mechanism that it is supposed to be in cases where parties have contracted for it. *See Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984). That hostility continues to pervade many state statutes purporting to regulate arbitration. Montana, for example, conditions enforcement of arbitration clauses on conspicuous disclosure on the face of a contract of the fact that it includes a provision for arbitration. *See* Mont. Code Ann. § 27-5-114(4). Numerous other states have adopted statutory provisions that purport in similar fashion to condition or otherwise impair the enforceability of arbitration agreements.[3]

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[3] *See, e.g.*, Iowa Code Ann. §§ 679A.1-2a and c (barring enforcement of prospective arbitration agreements contained in "contracts of adhesion" or providing for arbitration of "any claim sounding in tort", unless the arbitration is provided for in an entirely separate agreement); Mo. Rev. Stats. § 435.350 (excluding "contracts of adhesion" from general rule of enforceability of arbitration clauses); Tex. Rev. Civ. Stats. Art. 224 (conditioning enforceability of arbitration agreement on its having been made "upon the advice of counsel to both parties as evidenced by counsels' signatures thereon . . . . "); So. Car. Code

Insofar as arbitration agreements coming within the scope of the Federal Arbitration Act are concerned, these anti-arbitration provisions are substantively meaningless—at least in theory. Under the Supremacy Clause, an arbitration agreement satisfying the criteria specified in 9 U.S.C. § 2 is "valid, irrevocable, and enforceable" notwithstanding contrary state law, *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), unless a defense applicable to contracts generally—and not merely to arbitration agreements—can be established. *See Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-404 (1965).

To hold that state courts may, in their discretion, allow parties to proceed with litigation in state courts despite a contractual obligation to arbitrate would countenance procedural negation of the substantive supremacy to which the Federal Arbitration Act is constitutionally entitled. By the simple expedient of refusing to stay proceedings on the basis of a discretionary determination for which no specific ground needs to be stated and which cannot be effectively reviewed, a state court hostile to arbitration could deprive one party of the benefits of its arbitration agreement. The exercise of unexplained judicial discretion could in that case thwart federal policy even though elaborate and straightforward state statutory regulation could not.

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§ 15-48-10(a) (conditioning enforceability of arbitration agreement on conspicuous disclosure of fact that agreement includes arbitration clause); and Wis. Stats. § 135.05 (conditioning enforceability of arbitration agreements in dealership contracts on agreement providing dealer with protection at least equal to that provided by dealer statute itself).

The reason for this anomaly is that the Federal Arbitration Act, though articulating a strong federal policy and providing an array of remedies to effectuate that policy, does *not* create a substantive claim within the federal question jurisdiction of the federal courts. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983). Removal to federal court of a state court case involving arbitrable issues is possible only if diversity or some other independent basis for federal jurisdiction exists. Where, as here, plaintiffs have asserted no federal claim and have foreclosed complete diversity by joining co-citizens as defendants on allegations that are not frivolous on their face, removal is impossible and the case must remain in state court.[4]

The principal defendant, to be sure, may often (though not always) invoke diversity jurisdiction in order to bring an independent action in federal court to compel arbitration pursuant to 9 U.S.C. § 4, as Snap-on did in this case. Unfortunately, that does not solve the problem. That defendant is still required to bear the expense and inconvenience of state court litigation, which deprives it of one of the principal benefits of arbitration. As the Texas Court of Appeals explained, in reversing a trial court's refusal to com-

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[4] Implementation of this tactic is a straightforward matter in the typical case, because the principal defendant will usually have employees who are citizens of the same state as the plaintiffs and who had some involvement with the transaction in dispute. Unless the pleadings themselves are plainly inadequate under state substantive law or the allegations are simply imaginary, the sharply limited right to disregard the citizenship of non-diverse parties on grounds of sham joinder provides no effective remedy.

pel arbitration of claims before it pursuant to 9 U.S.C. § 4:

> To compel the parties to proceed to a traditional trial on the merits, "only to have that lawsuit rendered a nullity on appeal," and finally reach the arbitration the parties originally agreed to is no adequate remedy under any definition. Even though the parties will eventually proceed to arbitration, to postpone it until after trial and appeal renders their arbitration agreement meaningless. [citing cases] . . . . The benefits of arbitration (speed and lower cost) will be lost once the parties are forced to go through the litigation and appellate processes.

Shearson Lehman Hutton, Inc. v. McKay, 763 S.W.2d 934, 939 (Tex. App. 1989) (parenthetical explanation in original).

Indeed, if a state court action proceeds to judgment before arbitration can be compelled, and then completed, and the resulting award confirmed and reduced to judgment, the *entire* benefit of the arbitration agreement may arguably be lost at least in some states. In states that, unlike Texas, have not expressly addressed the issue, it is not at all clear how (if at all) the state court judgment could be set aside, and its *res judicata* and collateral estoppel effects avoided, on the basis of a conflicting or inconsistent arbitral award. Allowing parallel pursuit of litigation and arbitration not only encourages the parties to engage in a frantic race to judgment, it leaves them with no practical alternative but to do so.

Arguably, a party that has sought a § 4 compulsion order in federal court may also ask the federal court to stay parallel state-court litigation pending arbitration, pursuant to 28 U.S.C. §§ 1651 and 2283 (as Snap-on in fact has done). As noted at pp. 21-22, *infra*, the lower federal courts have frequently held that they have such power, although this Court has reserved judgment on the issue. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983).

Assuming that this option is ultimately held to be available, however, it fails for three reasons to provide a party seeking arbitration with everything 9 U.S.C. § 3 provides. First, by requiring two lawsuits in two courts at two different levels, it complicates litigation instead of simplifying it, and makes ultimate disposition more expensive rather than less. Second, it forces the party seeking arbitration to rely on an exercise of the discretion inherent in 28 U.S.C. §§ 1651 and 2283, rather than the categorical command of 9 U.S.C. § 3. Third, it confronts that party with a gratuitous obstacle in the form of any federal court's natural reluctance to inject itself into what it may see as the case management and docket control activities of a state court.

III. THE CONTENTION THAT SECTION 3 OF THE FEDERAL ARBITRATION ACT DOES NOT APPLY IN STATE COURTS WOULD BE INCONSISTENT WITH THE STATUTORY LANGUAGE AND WITH THE STATUTORY SCHEME AS A WHOLE.

These anomalies, however unfortunate, might not be remediable by this Court if they resulted from Congress's failure to mandate stays of state court

litigation in deference to arbitration.[5] If Congress intended 9 U.S.C. § 3 to apply only in federal court and to play no role in regulating state court litigation implicating that statute, then any duty on the part of state courts to stay litigation pending arbitration would have to be found elsewhere. Such a narrow interpretation of § 3, however, would artificially and unnecessarily narrow the express terms of the statute and would impair the coherence of the statutory scheme that has emerged from decades of interpretation by this Court.

In language that this Court has said is "ambiguous[]", *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,460 U.S. 1, 26 n.34 (1983), § 3 mandates a stay of proceedings pending arbitration when "any issue" in a case brought in "any of the courts of the United States" is referable to arbitration under a qualifying agreement. The ambiguity is undeniable. "[A]ny of the courts of the United States" could mean either "any court existing by the authority of the United States government" or "any court within the United States." Both interpretive and policy considerations suggest that the former, narrow interpretation is mistaken and the latter, inclusive interpretation is correct.

What the Statute Says. When the Congress that adopted the Federal Arbitration Act intended to re-

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[5] They are likewise unavoidable where they result from the decision of the parties to the arbitration agreement to contract for application of state law, including state procedural law. *See, e.g., Volt Information Sciences, Inc. v. Stanford University Board of Trustees*, 489 U.S. 466 (1989). Here, the parties contracted expressly for arbitration questions to be governed by the Federal Arbitration Act and not by state law.

strict a provision to federal court, it left no room for conjecture about what it was doing. In contrast to the unqualified reference to "any of the courts of the United States" in § 3 of the Federal Arbitration Act, § 4 as originally enacted unambiguously limited its reach to federal courts, referring with unmistakable precision to

> any court of the United States which, save for such [arbitration] agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties . . . .

Act of Feb. 12, 1925, chap. 213, § 4, 43 Stat. 883.

Significantly, when Congress in 1954 adopted a comprehensive measure for the purpose of correcting obsolete references in various federal statutes, it made no change at all to § 3. It amended § 4, however, to refer to

> any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties . . . .

Act of Sept. 3, 1954, now codified at 9 U.S.C. § 4. The Senate Judiciary Committee Report explained that, "'United States district court' was substituted for 'court of the United States' because, among Federal courts, such a proceeding [*i.e.*, an original petition to compel arbitration] would be brought only in a district court." Senate Report No. 2498 at p. 9 (83rd Cong., 2d Session Aug. 18, 1954). Congress obviously

did not believe that a § 3 motion to stay litigation pending arbitration could likewise be brought only in a federal district court.

And for good reason. State courts are as a matter of plain language among the "courts of the United States", in the same way that institutions of higher learning established by the states are among "the colleges and universities of the United States". The states are not merely integral components of a politically indivisible nation, they are collectively "*the* United States". Calling courts established by the several states "courts of the United States" is not a legal fiction indulged to finesse inconvenient statutory language—it is the literal meaning of the words Congress chose to use.

The Statutory Scheme. This Court has rejected the view that the Federal Arbitration Act was merely a pre-*Erie* prescription of law to be applied to proceedings in federal court. *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984). This Court has instead found in that statute a preemptive exercise of Congress's plenary powers under the Commerce Clause, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 401-402 & nn. 6-7 (1965), whose substantive provisions apply in state and federal court. *Southland Corp., supra*; *Moses H. Cone, supra* at 24. Though certainly not free from dissent as it evolved, this reading of the statute is now firmly established and all parties involved appear to recognize that it is far too late in the day to consider its reversal.

The key question is thus not so much how § 3 might be interpreted if it were read in isolation, but what it means as an integral part of the coherent statutory scheme that has emerged from this Court's shaping

of the FAA's prescription that qualifying arbitration agreements are "valid, irrevocable and enforceable . . . ." Viewed in that light, the question of whether § 3 applies in state courts virtually answers itself. *A priori*, several different ways of making arbitration agreements functionally enforceable might be imagined. Once the congressional policy objective of ensuring speedy, definitive and low-cost resolution of commercial disputes is admitted, however, the only enforcement scheme that does not defeat the statute's purpose is the one that Congress in fact provided—*i.e.*, mandatory delay of litigation in deference to arbitration. Any other approach by definition makes ultimate resolution of the dispute more complicated, costlier and more time-consuming, so that whatever vindication of a party's arbitration rights eventually emerges is a hollow victory.

Section 3, in other words, is itself a substantive rather than a procedural provision. It does not tell either state or federal courts *how* litigation shall proceed. It tells them both that litigation *shall not* proceed until arbitration has been had.

Not only do the anomalies entailed by the narrow interpretation argue against the practical utility of that interpretation, they also cast doubt on the plausibility of any congressional intent to legislate such a result. In the face of diametric conflict between competing policy concerns, Congress deliberately chose to displace a regime of hostility to arbitration long-established in state and federal substantive law. To give meaning to that choice, Congress thought it necessary to require federal courts (at least) to stay litigation involving any issue referable to arbitration, divesting those courts of any discretion in that area.

The suggestion that Congress nevertheless intended state courts to have an unbridled discretion flatly denied to their federal counterparts imputes to the statutory scheme an incoherence fundamentally inconsistent with the importance Congress clearly attached to the policy judgment it had made. As this Court put it in *Moses H. Cone*, 9 U.S.C. § 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive *or procedural* policies to the contrary." 460 U.S. at 24 (emphasis added) It would also be inconsistent with this Court's insistence that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25.

The only countervailing consideration is an understandable reluctance to prescribe what superficially appear to be procedural rules for state courts through federal enactments. This concern is not trivial. Upon examination, however, it does not warrant the crippling impairment of the Federal Arbitration Act that the narrow interpretation of § 3 would bring about.

The notion that Congress can tell the state courts what they must do but may not tell them how they must do it is formalistic hair-splitting, long discredited in other areas of interplay between the state and federal systems.[6] The substance/procedure distinction

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[6] *See, e.g., Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949) (a "federal right cannot be defeated by the forms of local practice"); *see also Felder v. Casey*, 487 U.S. 131, 150-151 (1988) ("Federal law takes state courts as it finds them

is as false here as it is in other areas of the law. Substantive regulation cannot be divorced from prescriptions with procedural implications.

One of the most obvious examples is the command of 28 U.S.C. § 1446(d) that, after removal of a civil action from state to federal court "the State court shall proceed no further unless and until the case is remanded." Even more to the point is the authority of federal courts to stay state court litigation when it is necessary to do so in aid of the federal courts' own jurisdiction. *See* 28 U.S.C. §§ 1651, 2283. Indeed, the lower federal courts have consistently held that these provisions give them authority to stay state court litigation pending arbitration.[7] It would be

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only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws' . . . Just as federal courts are constitutionally obligated to apply state law to state claims, . . . so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' ") (citations omitted); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("Whatever spring the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."); *see generally Testa v. Katt*, 330 U.S. 386, 391 (1947).

[7] *See, e.g., McGuire, Cornwell & Blakely v. Grider*, 765 F. Supp. 1048, 1052 (D. Colo. 1991); *McMahon v. Shearson/American Express Inc.*, 709 F. Supp. 369, 374-75 & n.21 (S.D.N.Y. 1989), *merits not appealed, sanctions vacated*, 896 F.2d 17 (2d Cir. 1990); *Hunt v. Mobil Oil Corp.*, 583 F. Supp. 1092, 1095 (S.D.N.Y. 1984); *Blount Brothers Corp. v. M. K. Steel, Inc.*, 524 F. Supp. 1037, 1039 (N.D. Ala. 1981); and *Network Cinema Corp. v. Glassburn*, 357 F. Supp. 169, 172 (S.D.N.Y. 1973). This Court has reserved judgment on that issue. *See Moses H. Cone Mem-*

anomalous in the extreme to suggest that Congress can authorize federal courts to stay state court litigation but lacks the power to direct the state courts themselves to do so.

Congress has decided that parties who have contracted for arbitration should get the benefits of their bargain, which include the speed, lack of expense, and finality of arbitral procedures and avoidance of the cost, vexation and delay of parallel litigation. Such parties cannot get those benefits unless arbitration is completed before litigation of arbitrable issues proceeds. It made sense for Congress to require that to happen, as well as to preserve the jurisdiction of federal courts to entertain motions to confirm arbitral awards and to enter judgment upon them. That is precisely what Congress did when it adopted 9 U.S.C. § 3.

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orial Hospital v Mercury Construction Corp., 460 U.S. 1, 25 n.32 (1983).

CONCLUSION

For these reasons, petitioners respectfully pray for issuance of a writ of certiorari to the Montana District Court for the Fourth Judicial District, Missoula County, Montana, for review and reversal of that court's order denying petitioners' motion for a stay of proceedings pending arbitration.

Dated this 12th day of September, 1993.

Respectfully submitted,

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APPENDIX

APPENDIX

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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 93-302

SNAP-ON TOOLS CORPORATION, JAMES GOMENDI, and STEVE GULLEDGE,

Relators,

v.

FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY, and THE HONORABLE JOHN W. LARSON, Presiding Judge, and WILLIAM C. VETTER and ELAINE LAPOINTE-VETTER,

Respondents.

ORDER

Relators Snap-On Tools Corporation, James Gomendi, and Steve Gulledge, having applied to this Court for a writ of supervisory control, and this Court having now considered the application and the arguments in opposition thereto,

IT IS HEREBY ORDERED that Relators' application for a writ of supervisory control is DENIED.

The Clerk is directed to mail a true copy of this order to all counsel of record and to the Honorable John W. Larson, District Judge.

DATED this 27th day of July, 1993.

/s/ ????
Chief Justice

/s/ John Conway Harrison

/s/ ????

/s/ ????

/s/ Karla M. Gray

/s/ ????

/s/ ????

Justices

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 93-302

SNAP-ON TOOLS CORPORATION, JAMES GOMENDI, and STEVE GULLEDGE,

Relators,

v.

FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY, and THE HONORABLE JOHN W. LARSON, Presiding Judge, and WILLIAM C. VETTER and ELAINE LAPOINTE-VETTER,

Respondents.

FILED

AUG 31 1993

/s/ Ed Smith

CLERK OF SUPREME COURT
STATE OF MONTANA

ORDER

On May 27, 1993, the District Court issued an opinion and order denying appellants' motion to stay proceedings pending resolution of appellants' petition to compel arbitration filed in a companion case in Federal Court. On June 14, 1993, appellants filed their notice of appeal from the District Court's order denying their motion for a stay.

On August 9, 1993, respondents filed their motion in this court for an order dismissing the appeal on the basis that it is not an appealable order pursuant to Rule 1, M.R.App.P.

Appellate Rule 1 allows appeals from final judgments or from certain interlocutory orders specified in Rule 1(b)(2). There was no final judgment entered in the District Court, and an order denying a motion to stay proceedings is not one of the specified interlocutory orders provided for in Rule 1(b)(2).

Section 27-5-324, MCA, provides for an appeal from an order denying an application to compel arbitration or from an order staying arbitration. However, no such order has been entered in the District Court because appellants' petition for an order compelling arbitration was filed in Federal District Court, rather than in the State District Court.

Therefore, we conclude that there is no basis for an appeal from the order entered by the District Court denying appellants' motion for a stay of proceedings, and the appellants' appeal is, accordingly, DISMISSED.

The Clerk is directed to mail true and correct copies of this order to all parties of record.

Dated this 31st day of August, 1993.

/s/ ????
Chief Justice

/s/ John Conway Harrison

/s/ ????

/s/ ????

/s/ Karla M. Gray

/s/ ????

/s/ ????
Justices

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

Cause No. 77498/21

WILLIAM C. VETTER, an individual, and ELAINE LAPOINTE-VETTER, an individual,

Plaintiff,

vs.

SNAP-ON TOOLS CORPORATION, a corporation; JAMES GOMENDI, an individual, and STEVE GULLEDGE, an individual,

Defendant.

FILED MAY 27 1993

BY KATHLEEN D. BREUER, CLERK
Laura M. Driscoll
Deputy

OPINION AND ORDER

This hearing was held on Wednesday, May 19, 1993. William and Elaine Vetter have filed a Complaint in this Court against Snap-On Tools, its employee, James Gomendi, and a former employee, Steve Gulledge. The theory of recovery advanced by the Vetters includes intentional and/or negligent representation, negligence and interference with economic advantage in connection with William Vetter's signing of a franchise agreement (the "Agreement") with Snap-On Tools. Almost a month after Vetters' claims were filed in this Court, Snap-On filed a Motion to Compel Arbitration in a Federal Court proceeding against William Vetter. Snap-On claimed diversity jurisdiction on the basis that it is a Delaware Corporation with its prin-

cipal place of business is in Wisconsin while Vetter is a resident of Montana. Snap-On did not list any of its employees or Elaine Vetter as parties in the Federal Court proceeding. Vetter has opposed Snap-On's Motion to Compel in Federal Court.

Snap-On has moved in this Court to stay the proceedings and in the alternative to dismiss for failure to state a claim. Snap-On's theory in its Motion to Stay Proceedings is that (1) the arbitration provision in the Agreement is valid and this Court should stay proceedings pending arbitration; and (2) this Court, to promote judicial economy, should stay proceedings pending action by the Federal Court on Snap-On's Motion to Compel Arbitration. Snap-On admitted at the hearing that this Court has the discretion whether or not to stay the proceedings. Snap-On's Motion to Dismiss is based on the premise that because the Agreement requires the parties to submit their claims to arbitration, the Vetters have failed to state a claim in this Court.

After review of the file herein, including the arguments advanced by counsel both in their briefs and oral argument, the Court makes the following determination concerning Snap-On's Motion for a Stay.

1. Snap-On's Motion for a Stay with regard to William and Elaine Vetter's claims against Snap-On Tools and its employee James Gomendi and former employee Steve Gulledge is hereby denied.

2. In considering a motion to dismiss under Rule 12(b)(6), M.R.Civ.P., the complaint must be construed in the light most favorable to the plaintiff, and all allegations of fact contained therein must be taken as true. *Wilson v. Taylor*, 194 Mont. 123, 126, 634 P.2d 1180 (1981). A complaint may not be dismissed for failure to state a claim unless the plaintiff can prove no set of facts in support of his claim. *Id.*

Although William Vetter has submitted an Affidavit, the Court has considered Snap-On's Motion to Dismiss without regard to the Affidavit. Based solely on the pleadings, the Court finds that at this stage in the case claims have been stated by the Vetters which may not be subject to the arbitration clause of the Agreement. The Motion to Dismiss is therefore denied.

DATED this 27th day of May, 1993.

/s/ John W. Larson
JOHN W. LARSON
District Judge

cc: Donald V. Snavely
Paul J. Petit

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

Cause No. 77498

WILLIAM C. VETTER, an individual, and ELAINE LAPOINTE-VETTER, an individual,

Plaintiffs,

-vs-

SNAP-ON TOOLS CORPORATION, a corporation; JAMES GOMENDI, an individual, and STEVE GULLEDGE, an individual,

Defendants.

COMPLAINT FOR DAMAGES AND OTHER RELIEF
-and-
DEMAND FOR JURY TRIAL

Plaintiffs William C. Vetter and Elaine LaPointe-Vetter ("Plaintiffs"), for their claims against the defendants named above, allege as follows:

I. PARTIES

1. Plaintiffs are husband and wife, are residents of Missoula County, Montana, and acquired and operated a Snap-On Tools dealership from about September, 1990 through May of 1991.

2. Defendant Snap-On Tools Corporation ("Snap-On") is a corporation which conducts business throughout the State of Montana, including in Missoula County, through authorized dealers and other employees and agents. Snap-On is engaged in business, among other things, in selling mechanic's tools and accessories to the motor vehicle mechanic's trade.

3. Defendant James Gomendi ("Gomendi") is an individual who resides in the State of Montana. Defendant

Steve Gulledge ("Gulledge") is an individual whose residence is unknown. Defendants Gomendi and Gulledge were, all times material to this action, agents and employees of Snap-On who made representations to the Plaintiffs, and otherwise dealt with the Plaintiffs, concerning the Snap-On dealership in western Montana in which Plaintiffs invested and which they operated.

4. The term "Defendants" shall mean and include Snap-On, Gomendi and Gulledge. The term "Defendant" shall refer to any one of these Defendants. References in this Complaint to acts or omissions being committed by the "Defendants" shall mean that said acts and omissions were performed by each Defendant, personally or acting through the agency of another Defendant.

5. Plaintiffs are informed and believe that, in performing the acts and omissions alleged below, each Defendant was acting as the employee and/or agent of each other Defendant, each Defendant performed said acts and omissions within the course and scope of his/her employment and/or agency with the other Defendants and with the full permission and knowledge of the other Defendants, and the other Defendants authorized and/or ratified all acts and omissions of each other Defendant, as alleged below, pursuant to said employment and/or agency.

II. JURISDICTION/VENUE

6. This Court has jurisdiction over this cause pursuant to its general original jurisdiction provided by Montana Code Annotated § 3-5-302. Acts and omissions which are the subject of this cause principally occurred in the State of Montana. Further, this cause involves claims arising out of the statutes and common law of the State of Montana.

7. The torts described below were committed in Missoula County, Montana. Venue is thus proper in this Court pursuant to Montana Code Annotated § 25-2-122.

III. CLAIMS FOR RELIEF

8. Plaintiffs incorporate by reference herein each and every allegation set forth in paragraphs 1-7 above.

9. In about August of 1990, Plaintiffs were approached by the Defendants for the purpose of soliciting Plaintiffs to serve as a Snap-On dealer in the Missoula area. In order to induce Plaintiffs to invest monies in a Snap-On dealership, the Defendants represented to Plaintiffs, both orally and in writing, various material facts, including among others the following: (a) if Plaintiffs worked on the business an average of 60 to 70 hours per week they would earn a minimum of $50,000.00 net before taxes as a Snap-On dealer; (b) after reviewing Plaintiffs' financial resources, Plaintiffs had sufficient capital to invest in and operate a Snap-On dealership; (c) if Plaintiffs followed the Snap-On sales and marketing program they would earn net profits initially of $50,000.00 per year and these profits would increase with time; (d) Snap-On would provide adequate and ongoing support for Plaintiffs' operation of a Snap-On dealership by adequately training Plaintiffs, providing demonstrations of all Snap-On products to Plaintiffs, advising Plaintiffs as to the proper methods of operating their business, assisting Plaintiffs in obtaining financing for their dealership, and timely delivering all orders of Snap-On tools made by Plaintiffs; and (e) Plaintiffs' operation of a Snap-On dealership would ultimately lead to long-term financial security for Plaintiffs and their family. At this time the Defendants further represented to Plaintiffs that they had more than 70 years expertise in the marketing of mechanic's tools and that Plaintiffs, who were inexperienced in that area, could rely upon the Defendants' expertise and guidance to establish and operate a successful and profitable Snap-On dealership in western Montana.

10. As a result of the self-proclaimed expertise of the Defendants in marketing mechanic's tools, their long his-

tory of working in the industry, their representations to Plaintiffs, and Plaintiffs' inexperience in the industry, a relationship of trust and confidence arose between the Defendants, on the one hand, and the Plaintiffs, on the other hand, such that the Defendants owed fiduciary duties of the highest order to Plaintiffs, including among others the duty to avoid making the slightest misrepresentation or concealment of any kind to the Plaintiffs, the duty not to obtain any advantage from the Plaintiffs without fully disclosing all material facts to the Plaintiffs, and generally the duty to act with undivided loyalty, fidelity and the highest good faith in all of their dealings with Plaintiffs.

11. In reliance upon the misrepresentations of the Defendants and the relationship of trust and confidence existing between them and the Defendants, Plaintiffs invested virtually all of their life savings in a Snap-On dealership in the Missoula area. Plaintiffs commenced the operation of that dealership in September of 1990 and continued operating that dealership until May of 1991.

12. At the time the Defendants made the foregoing representations to Plaintiffs, the Defendants concealed material information from Plaintiffs. Among other things, the Defendants failed to disclose to Plaintiffs (a) that the prior Snap-On dealer in the subject territory, as well as the Defendants themselves, had alienated numerous customers to the point where they would not purchase Snap-On products, (b) that the sales for the prior Snap-On dealer were declining at the time he terminated his dealership with Snap-On, and (c) that as a result of new competition, alienation of customers, reduced market territory for this dealership and other factors the subject Snap-On dealership would generate sales and profits significantly less than those which were represented to Plaintiffs, and in fact could not be operated at any reasonable profit. Rather, the Defendants represented to Plaintiffs that the prior Snap-On dealer had averaged $5,500.00 per week in gross sales for the year prior to the termination of his relation-

ship with Snap-On, that Plaintiffs could readily continue to generate sales in approximately that amount during their operation of the dealership, and that sales in that amount would generate net profits to Plaintiffs in excess of $65,000 per year.

13. Plaintiffs are informed and believe that the foregoing representations of the Defendants, and the Defendants' concealment of material information from Plaintiffs, were performed knowingly, intentionally, fraudulently, with knowledge that the statements were false when they were made, and with knowledge that Plaintiffs were relying upon the nonexistence of the nondisclosed facts. At a minimum, Plaintiffs are informed that the Defendants made these representations, and concealed these facts, negligently without any reasonable basis for believing them to be true and without exercising reasonable care in obtaining and communicating this information to Plaintiffs.

14. The facts as represented to Plaintiffs by the Defendants were false. Among other things, at the time these representations were made the Snap-On dealership sold to Plaintiffs was not capable of generating net profits in the amount of $50,000.00 per year and could barely be operated on a "break even" basis, more than 90 hours per week were required from Plaintiffs to properly operate that dealership under Snap-On guidelines, significantly greater capital was required to operate the dealership than Plaintiffs had available to them, the prior Snap-On dealer had not generated average weekly sales in the amount of $5,500.00 for the year prior to Plaintiffs' purchase, and generally the subject Snap-On dealership was a nonprofitable dealership because of increased competition in the area, alienation of clients which resulted from the Defendants' conduct, the Defendants' effort to reduce the territories of its dealers in such a manner that the individual dealers would suffer but the Defendants would

profit, and the failure of the Defendants to adequately support and assist their dealers as represented.

15. During their operation of their Snap-On dealership, Plaintiffs worked diligently to promote the business. Plaintiffs spent in excess of 100 hours per week working on the business, invested all of their available capital in the business and borrowed additional sums of money which were injected into the business, and generally exercised their best efforts to operate and promote the business. Notwithstanding these efforts, the dealership failed to generate any net profits and Plaintiffs lost all of their investment in the same.

16. During Plaintiffs' operation of the Snap-On dealership, the Defendants engaged in a course of conduct which operated to interfere with Plaintiffs' successful operation of the business and their obtaining any economic benefit therefrom. Among other things, the Defendants imposed unduly burdensome and unnecessary paperwork and reporting requirements on the Plaintiffs, continually alienated and harassed customers of Plaintiffs, continually harassed and intimidated Plaintiffs, and generally engaged in a course of conduct designed to control the manner in which Plaintiffs operated their dealership so as to increase profits for the Defendants but decrease profits for individual dealers.

17. As a result of the foregoing, Plaintiffs were forced into terminating their Snap-On dealership in May of 1991. Plaintiffs were thereafter forced to liquidate their inventory and equipment and suffered substantial losses as a result thereof.

18. The Defendants obtained an advantage from the Plaintiffs by reason of the foregoing conduct, including profits from product sales made by Plaintiffs. The Defendants are thus liable to Plaintiffs for constructive fraud, as well as actual fraud for intentional and/or negligent misrepresentation and concealment of material facts.

Further, the conduct of the Defendants alleged above was performed negligently and contrary to the standards of care of a reasonable person in similar circumstances. Additionally, the Defendants are liable to Plaintiffs' for interfering with prospective and actual economic advantage attributable to the efforts and work of Plaintiffs.

19. As a direct and proximate result of the foregoing, Plaintiffs have been damaged in that they have lost substantial sums of money invested by them in the Snap-On dealership, they have wasted countless hours of their time in a futile effort to operate the Snap-On dealership, Plaintiffs have suffered severe stress, strain, harassment, embarrassment and other emotional distress, and consequent bodily injury, and Plaintiffs have suffered other general damages, the full extent, nature and amount of which are presently unknown but will be proven at the trial of this action.

20. Plaintiffs are informed and believe that the foregoing conduct of the Defendants was committed fraudulently, maliciously, oppressively, and otherwise in such a manner as to render the Defendants liable for an award of punitive, or exemplary, damages in this action.

21. Plaintiffs seek an award of attorney's fees and costs incurred in prosecuting this action pursuant to the pertinent Montana laws, if any.

WHEREFORE, Plaintiffs pray for judgment against Snap-On, Gomendi and Gulledge, jointly and severally, as follows:

(i) An award of compensatory damages in such amounts as are proven at trial;

(ii) An award of punitive damages in such amounts as are proven at trial, should the conduct of the Defendants be found sufficiently culpable to warrant the same;

(iii) An award of all reasonable attorney's fees and costs incurred by the Plaintiffs in connection with this proceeding to the extent permitted by applicable Montana laws; and

(iv) An award of such additional relief as may be necessary or appropriate to protect or effectuate the rights of the Plaintiffs in connection with the transactions described above.

SNAVELY LAW OFFICES
Attorneys for Plaintiffs

DATED: 2/24/93

By: /s/ Don Snavely
Donald V. Snavely

DEMAND FOR JURY TRIAL

Plaintiffs hereby hereby demand trial by jury of all issues so triable in the above action.

SNAVELY LAW OFFICES
Attorneys for Plaintiffs

DATED: 2/24/93

By: /s/ Don Snavely
Donald V. Snavely

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

Cause No. 77498

WILLIAM C. VETTER and ELAINE LAPOINTE-VETTER,
Plaintiffs,

v.

SNAP-ON TOOLS CORPORATION, JAMES GOMENDI and STEVE GULLEDGE,
Defendants,

FILED MAR 22 1993

BY KATHLEEN D. BREUER, Clerk
Deputy

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO STAY PENDING ARBITRATION OF CLAIMS

INTRODUCTION

This brief is filed in support of a motion by Defendants, Snap-on Tools Corporation ("Snap-on") and its employee, Steve Gulledge and its former employee, James Gomendi,[1] for an order staying proceedings in the above-captioned action pending arbitration. The Defendants seek to enforce an arbitration agreement between Snap-on and plaintiff William Vetter, formerly

* * *

language does not permit the federal court to consider claims of fraud in the inducement of the

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[1] The defendants will be collectively referred to either as "defendants" or "Snap-On".

> contract generally. . . . We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

The Montana Supreme Court has also applied this holding to Montana state courts. *See, Larsen v. Opie*, 771 P.2d 977, 979-80 (1989); *Vukasin v. D.A. Davidson & Co.*, 785 P.2d 713, 716-17 (1990). Thus, the allegations of fraud in the inducement of the Dealer Agreement cannot defeat the agreement to arbitrate these claims.

B. Vetter Cannot Defeat the Arbitration Provision By Joining His Wife as a Party Plaintiff

The presence in this action of Mrs. Vetter as an additional plaintiff does not in any way dilute Snap-on's right to a stay under 9 U.S.C. § 3. The United States Supreme Court has held flatly that, "Under the [Federal] Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20 (note omitted).

The Montana Supreme Court has ordered plaintiffs who may not have been parties to the arbitration agreement to arbitrate whether or not they are covered by the agreement. In *Passage v. Prudential-Bache Securities, Inc.*, 727 P.2d 1298, 1303 (Mont. 1986), the parents of minor children sued their securities broker for mismanagement of their own accounts and some accounts held in the name of the children. The District Court found that the children were not signatories to any arbitration agreement, but stayed their action anyway, pending the resolution of the parents' claims in arbitration. The Supreme Court held that whether the childrens' accounts were covered by the arbitration agreement was, itself, an arbitrable issue and ordered the children to arbitrate their claims.

In this case, it appears that all of Mrs. Vetter's claims are derivative of her husband's claims. As such, her claims should at least be stayed pending arbitration of Mr. Vetter's claims. A key purpose of arbitration would be defeated if a party to an arbitration agreement could thwart that agreement by the simple expedient of joining to the action someone who had not signed the arbitration agreement. Instead of *reducing* the expense, vexation, delay and hazard of civil litigation, allowing such tactics to succeed would increase them by requiring litigation both in court and before the arbitrators.

Section 3 of the Federal Arbitration Act requires a stay of the entire proceeding when *any* arbitrable issue is involved in it. Section 3 would thus mandate the requested stay if any issue here were referable to arbitration. In fact, *every* issue in this case is arbitrable. The requested stay should be granted.

UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

9 UNITED STATES CODE, SECTION 3

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Supreme Court, U.S.
FILED
NOV 12 1993
OFFICE OF THE CLERK

No. 93-578

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SNAP-ON TOOLS CORPORATION, JAMES GOMENDI and STEVE GULLEDGE

Petitioners,

v.

WILLIAM C. VETTER and ELAINE LaPOINTE-VETTER,

Respondents.

Petition For A Writ of Certiorari To The Montana District Court For The Fourth Judicial District, Missoula County, Montana

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RESPONDENTS' BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Does diversity of citizenship jurisdiction exist over a petition to compel arbitration where one of the parties seeking to compel arbitration is non-diverse to the opposing party, yet is not formally joined as a party in order to create federal subject matter jurisdiction?

2. Should a federal court abstain from exercising jurisdiction over arbitration issues, which a state court is in the process of adjudicating, where the federal court does not have subject matter jurisdiction to resolve the entire arbitration controversy?

3. Does the "protect or effectuate its judgments" exception to the anti-injunction statute [28 U.S.C. § 2283] permit a federal court to enjoin a parallel state court proceeding involving the identical issues, where the state court first exercised jurisdiction over those issues?

4. Is the Montana Uniform Arbitration Act's requirement that all contracts with an arbitration clause contain a conspicuous warning notice on the front page pre-empted by the Federal Arbitration Act, despite this Court's approval of state arbitration law procedural provisions in Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989)?

5. Are general state law prohibitions against forum selection clauses, and clauses limiting the time period for bringing legal action, pre-empted by the Federal Arbitration Act when those clauses are contained in an arbitration contract?

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SUMMARY OF ARGUMENT

The State Court Order which Petitioners request this Court to review was not final and is now moot. The stay pending arbitration requested by Petitioners has now been granted. The mandatory or discretionary nature of 9 U.S.C. § 3 is not an issue in this case.

This case does, however, present important questions concerning the authority of federal courts to interfere with an ongoing state court disposition of arbitration issues. This case also raises important issues regarding the ability of the states to insure voluntary, knowing, and even-handed agreements to arbitrate, an objective which is entirely consistent with the Federal Arbitration Act.

The Petition should be denied, or if granted, the the entire arbitration controversy, as framed in two parallel state and federal actions, should be reviewed.

CLARIFICATION OF FACTS

Petitioners Snap-On Tools Corporation ("Snap-On"), James Gomendi ("Gomendi"), and Steve Gulledge (collectively "Petitioners") have framed the issue on the instant Petition for Writ of Certiorari ("Petition") as turning "entirely on whether 9 U.S.C. § 3 is applicable to state-court proceedings." Petition, pages 5-6. Petitioners implicitly argue that the Montana District Court for the Fourth Judicial District, Missoula County, Montana ("State Court") finally resolved all arbitration issues against Petitioners by ruling that 9 U.S.C. § 3 is discretionary, and not mandatory.

Petitioners have mischaracterized the proceedings below. 9 U.S.C. § 3 has no bearing on this case. What this case does involve, however, is the role of federal courts in resolving arbitration issues pending before state courts, and the power of the federal courts to enjoin a

state court from continuing to adjudicate arbitration issues over which the latter first exercised jurisdiction. This case invokes state/federal jurisdictional principles lying at the very heart of our federalist system.

A brief review of the procedural background of this dispute will assist in understanding the true nature of the issues presented by this case.

Respondent William C. Vetter ("William") and his wife, Elaine LaPointe-Vetter ("Elaine") [collectively the "Vetters"] filed the subject action[1] in the State Court on

[1]The State Court action, bearing Cause No. 77498 in the files of the Montana State Court, shall be referred to as the "State Action." The parties in the State Action are the Vetters, as plaintiffs, and all three Petitioners, as defendants. Petitioners Gomendi and Gulledge, who are employees of Petitioner Snap-On, were the principal actors causing the damage to the Vetters sought in the State Action. After being served in the State Action, Snap-On alone filed a companion federal court suit, bearing Cause No. CV 93-34-M-CCL (the "Federal Action") in the files of the United States District Court for the District of Montana, Missoula Division (the "Federal Court"), against William alone. Gomendi and Gulledge were not named as parties to the Federal Action because that would destroy the diversity jurisdiction of the Federal Court. However, Snap-On sought relief on behalf of Gomendi and Gulledge in the Federal Action. See discussion at pages 3-7, infra.

February 24, 1993, alleging various common law tort claims against Petitioners. Essentially, the Vetters alleged, first, that Petitioners had fraudulently induced them to invest their life savings in a failing Snap-On dealership, and second, that Petitioners had interfered with the Vetters' business relationships with actual and potential customers. The Vetters asserted that, as a result of Petitioners' activities, the dealership failed, the Vetters lost all of their life savings, and they incurred additional debts which put them on the verge of bankruptcy.

Petitioners responded to the Vetters' allegations on two fronts. First, Petitioners filed a motion to stay, pursuant to 9 U.S.C. § 3, in the State Action, seeking a stay of all claims[2] pending arbitration of William's claims against all three Petitioners. Second, Snap-On alone filed the Federal Action, seeking an order, pursuant to 9

[2]Petitioners sought a stay against Elaine's claims even though she signed no arbitration agreement.

U.S.C. § 4, compelling William to arbitrate his claims against all three Petitioners. Importantly, Petitioners did not request the State Court for an order compelling William to arbitrate his claims, even though Montana law[3] clearly permits a Montana state court to order such relief. The race to judgment on the competing arbitration motions in State Court and Federal Court then began.[4]

[3]Montana has adopted the Uniform Arbitration Act. Montana Code Annotated § 27-5-115(1) specifically allows a Montana state court to compel a party to arbitrate its claims if the court finds a valid arbitration agreement to exist. Petitioners initially argued that they were relying solely on the Federal Arbitration Act and that 9 U.S.C. § 4 did not apply in state courts. Interestingly, in October, 1993, after the Federal Court ruled in Snap-On's favor, Petitioners went back to State Court and sought an order compelling William to arbitrate his claims against Gomendi and Gulledge based upon 9 U.S.C. § 4. Thus, Petitioners' initial position that 9 U.S.C. § 4 only applied in federal courts was obviously asserted solely to enable Petitioners to forum shop for a federal judge who might be more favorable to their positions on arbitration, rather than due to any jurisdictional concerns.

[4]It is important to note that the multiplicitous proceedings which have occurred in this dispute to date have all focused upon the validity of the subject arbitration clause. Notwithstanding their touting the speed, efficiency and economy of arbitration, Petitioners have spread the instant arbitration controversy over the files of five adjudicatory bodies. In addition to filing the motion to stay pending arbitration in the State Action, Petitioners filed the Federal Action seeking an order

William moved to dismiss the Federal Action on the ground that the Federal Court lacked subject matter jurisdiction of the arbitration controversy. William argued that Gomendi, a Montana resident, was an indispensable party to the Federal Action because Snap-On sought enforcement of the subject arbitration clause[5] on

compelling arbitration. Petitioners then both sought a writ of supervisory control from and appealed to the Montana Supreme Court, and ultimately filed the Petition with this Court, seeking to overturn the State Court order denying a stay pending arbitration. Finally, Petitioners instituted arbitration proceedings with the American Arbitration Association, seeking an adjudication that William's claims in the State Action have no merit. William has not participated in the AAA arbitration because he can not afford to do so and his participation could waive his argument that the subject arbitration clause is invalid. Throughout all of these proceedings, the Vetters have consistently maintained that the State Court is the only body with jurisdiction to resolve all arbitration issues between all interested parties.

[5]The subject arbitration clause appears as paragraph 11 of the Dealership Agreement between William and Snap-On. A portion of that clause has been quoted at pages 2-3 of the Petition. The entire clause shall hereafter be referred to as the "Arbitration Clause". As discussed at p. 19, infra, the Arbitration Clause contains several one-sided provisions which favor Petitioners only. For example, the Arbitration Clause requires William to litigate all of his disputes in the State of Wisconsin, Snap-On's home base, and shortens the statute of limitations on all claims to one year. Montana law prohibits such provisions in all contracts, whether they concern litigation, arbitration, mediation, or any other means of dispute resolution.

Gomendi's behalf. Because the Federal Arbitration Act does not create an independent basis of federal jurisdiction [see Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 25, fn. 32 (1983)], and diversity of citizenship jurisdiction was lacking over an indispensable party to the arbitration controversy, William argued that the Federal Action should be dismissed for lack of subject matter jurisdiction.

Alternatively, William argued that the Federal Court should abstain from exercising jurisdiction because the State Court had already commenced exercising its unquestioned jurisdiction to resolve all arbitration issues. Federal court intervention in the process would inevitably result in piecemeal resolution of arbitration issues. Not only was the Federal Court unable to adjudicate the validity of the Arbitration Clause insofar as it concerned the claims against Gomendi, but the Federal Court did not have jurisdiction to confirm any arbitration award

between the parties [see General Atomic Company v. United Nuclear Corporation, 655 F.2d 968 (9th Cir. 1981)].

William's motion to dismiss the Federal Action was pending until September 27, 1993, at which time the Federal Court denied the same.

In the meantime, proceedings were ongoing in the State Court to resolve the same arbitration issues. On May 27, 1993, the State Court temporarily denied[6] Petitioners' Motion to Stay the State Action pending arbitration, ruling that the parties should present all of their arbitration arguments to it in subsequent proceedings. After unsuccessfully seeking review of that interlocutory order in the Montana Supreme Court, Petitioners ran back to the Federal Court and filed an

[6]This is the order of which Petitioners seek review by this Court. As noted at pages 12-13, infra, this order did not finally adjudicate any arbitration issues, but was designed solely to force all parties to present to the State Court all of their positions on the enforceability of the Arbitration Clause.

application for an injunction against further prosecution of the State Action. Nonetheless, William heeded the State Court's instructions and filed a motion in the State Action requesting resolution of all arbitration issues. At the same time William opposed Snap-On's application to the Federal Court for an injunction against the State Action.

Ultimately, Snap-On won the race to judgment. On October 8, 1993, the Federal Court granted Snap-On's motion to compel William to arbitrate his claims, and enjoined further prosecution of the State Action by William. The Federal Court overruled, as a matter of law, all six of William's challenges to the validity of the Arbitration Clause.[7] The Federal Court denied William

[7]William argued that the Arbitration Clause was invalid because: (1) the contract did not contain the conspicuous warning notice mandated by Montana Code Annotated § 27-5-114(4); (2) it contained forum selection and limitation of action provisions which are prohibited by Montana law in any contract; (3) it lacked consideration and mutuality of remedy because it permitted Snap-On to seek judicial relief on its only meaningful

his right to a jury trial of the factual issues underlying those challenges [see 9 U.S.C. § 4; Par-Knit Mills, Inc. v. Stockbridge Fabrics Company, 636 F.2d 51, 54 (3rd Cir. 1980)][8] However, the Federal Court did not resolve any arbitration issues between William, Gomendi and Gulledge, nor any issues dealing with the stay of Elaine's claims pending arbitration of William's claims.[9]

claims, yet required William to arbitrate all of his claims against Snap-On; (4) it was voidable on the ground of constructive fraud under Montana law because Snap-On induced a false impression in William's mind as to the effect of the Arbitration Clause; (5) due to the oppressive and one-sided nature of this specific Arbitration Clause, it was "unconscionable" under Montana law, which applies this doctrine to all contracts; and (6) the language of the Arbitration Clause only required arbitration of disputes arising out of the Dealership Agreement, whereas William's claims related only to the dealings of the parties, and none of the parties relied upon any provision of the Dealership Agreement to prosecute or defend against William's claims.

[8]The Federal Court order is currently on appeal to the United States Court of Appeals for the Ninth Circuit. William filed his Notice of Appeal on October 29, 1993.

[9]It is undisputed that Elaine did not sign the Arbitration Clause. Nonetheless, Petitioners argued that the result of William's arbitration would collaterally estop Elaine. Elaine successfully argued to the State Court that she would not be bound by the results of William's arbitration because she possessed separate and independent claims against Petitioners.

A hearing was then held in the State Action on William's motion to adjudicate the same arbitration issues resolved by the Federal Court [namely, whether the Arbitration Clause was invalid and unenforceable], as well as those arbitration issues left unresolved by the Federal Court. Deciding that it was bound by the collateral estoppel effect of the Federal Court order, the State Court did not rule on the merits of William's challenges to the Arbitration Clause, and denied William's motion. The State Court also ruled that Elaine could continue to prosecute her claims against Petitioners as she would not be bound by the results of William's arbitration.

Thus, there are now orders from two courts of concurrent jurisdiction resolving arbitration issues emanating from the same lawsuit. Were it not for the deference shown by the State Court to the Federal Court order, a deference which the Federal Court refused to give to the earlier orders of the State Court, inevitably

this case would involve conflicting adjudications of the same arbitration issues. The net result of the proceedings below is that the Federal Court acted as an appellate tribunal over the State Court, a role which this Court has long disavowed for the federal judiciary [see Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 295-96 (1970)].

Petitioners' request for this Court to review the May 27, 1993 State Court Order is thus misplaced. Not only did the State Court not finally adjudicate any arbitration issues by that Order, but all issues emanating from that Order are now moot. The intent of that Order was to hold that a viable dispute existed as to the validity of the Arbitration Clause, thus requiring all parties to present to the State Court all arguments concerning the enforceability of that clause.

In its response filed in the Montana Supreme Court regarding Petitioners' Application for a Writ of

Supervisory Control, the State Court clarified its May 27, 1993 Order as follows:

> "[T]he District Court found that there were potential issues with respect to the validity of the arbitration clause. Because Snap-On did not make a motion to compel arbitration in the District Court, the District Court did not make a finding as to the validity of the arbitration clause. It did, however, find that, based on the pleadings, claims have been stated by the Vetters that may not be subject to the arbitration clause. The District Court therefore denied Snap-On's motion to stay in order to give the Vetters an opportunity to argue in the District Court that the arbitration clause was invalid or inapplicable. The District Court did not find the arbitration clause invalid; it simply permitted the Vetters to argue in the District Court that it was invalid.
>
> "[T]he District Court's denial of Snap-On's motion for stay did not harm or prejudice Snap-On. The District Court did not make any final judgment and did not dispense with any claims. It simply allowed the Vetters' action to proceed to the next stage of litigation.
>
> * * *
>
> "The District Court's denial of Snap-On's motions has not in any way affected Snap-On's

> rights. Both the Vetters and Snap-On will have an opportunity to argue to the District Court that the Vetters' claims are subject to arbitration. Snap-On has not been deprived of its alleged right to arbitration; it has simply been required to make its arbitration argument in the District Court where the entire action began." [Emphasis added].

In essence, the State Court temporarily denied Petitioners' request for a stay pending arbitration. It then held that both Petitioners and the Vetters would have to present to it, in a subsequent proceeding, all of their arguments concerning the validity of the Arbitration Clause. Petitioners ultimately received the requested stay, albeit by improper resort to Federal Court.

The net result of all of these maneuverings, then, is that Snap-On bifurcated the arbitration dispute between two courts of concurrent jurisdiction in an effort to obtain a more favorable forum for resolution of its arguments concerning the validity of the Arbitration Clause. It then utilized the results of its forum shopping to collaterally estop William in the State Court, and thus deprive the

State Court of its unquestioned jurisdiction to resolve arbitration issues.

If such an effort is sanctioned, the federal courts will ultimately become the arbiters of every arbitration controversy emanating from state court cases in which there is any party of diverse citizenship. For that party could selectively sue in federal court a diverse party from the other side of the state court case, obtain a determination as to the validity of the arbitration agreement, and then run back to state court arguing that the state court was collaterally estopped from resolving the same arbitration issues. The potential conflicts between the state and federal courts in these circumstances abound. If this Court decides to exercise its discretionary jurisdiction to review the State Court Order, it should assume jurisdiction over the entire controversy, including all federal jurisdictional issues necessarily involved.

IMPORTANT QUESTIONS ARE PRESENTED BY THE ENTIRE CONTROVERSY WHICH SHOULD BE REVIEWED BY THIS COURT

If this Court decides to grant certiorari in this case, it should exercise jurisdiction over both pending actions, the State Action and the Federal Action. The Federal Action is currently on appeal to the Ninth Circuit Court of Appeals. The State Action is on hold, insofar as William's claims are concerned. Petitioners are attempting to adjudicate William's claims in the AAA arbitration, although William can not and will not participate in that arbitration. The State Action is moving forward to adjudicate the claims of Elaine, who signed no arbitration agreement.

Review by this Court of the entire controversy will resolve important questions concerning the interaction of the federal and state courts in resolving arbitration issues emanating from a proceeding in one of those courts. For

example:

1. Does a federal court possess diversity of citizenship jurisdiction over a petition to compel arbitration where one of the parties seeking to compel arbitration is non-diverse to the opposing party, yet is not formally joined as a party petitioner in order to create federal subject matter jurisdiction? An unbroken line of precedent [E.g., Wilson v. Oswego Township, 151 U.S. 56 (1894)] holds that the non-diverse citizenship of absent indispensable[10] parties destroys federal subject matter jurisdiction. The Federal Court Order ignores these established limitations on federal court jurisdiction.

2. Do the abstention principles relevant to

[10]The "indispensability" of Gomendi to the Federal Action is best demonstrated by the fact that, after obtaining the Federal Court Order compelling William to arbitrate his claims against Snap-On, Petitioners successfully moved the State Court to compel William to arbitrate his claims against Gomendi based upon the preclusive effect of the Federal Court Order. It is just such potential collateral estoppel effects of the federal court proceeding which renders Gomendi an indispensable party to the Federal Action. See, e.g., Takeda v. Northwestern National Life Insurance Company, 765 F.2d 815 (9th Cir. 1985).

arbitration controversies, as espoused by this Court in Moses H. Cone, permit a federal court to adjudicate a portion of an arbitration dispute which a state court is in the process of adjudicating, where the federal court does not have subject matter jurisdiction to resolve the entire arbitration controversy? The Federal Court interpretation of Moses H. Cone conflicts with established precedent [E.g., Nakash v. Marciano, 882 F.2d 1411 (9th Cir. 1989)] which holds that abstention is appropriate in these circumstances.

3. Does the "protect or effectuate its judgments" exception to 28 U.S.C. § 2283 permit a federal court to enjoin a parallel state court proceeding involving the identical issues, where the state court first exercised jurisdiction over those issues? The decision of this Court in Chick Kam Choo v. Exxon Corporation, 486 U.S. 140 (1988) teaches that it does not apply, thus precluding issuance of the injunction granted in this case. The

Federal Court injunction here and other lower federal court precedent [E.g., McGuire, Cornwell & Blakely v. Grider, 765 F.Supp. 1048 (D.Colo. 1991) and Hunt v. Mobil Oil Corporation, 583 F.Supp. 1092 (S.D.N.Y. 1984)] hold to the contrary.

4. Is the Montana Uniform Arbitration Act's requirement that all contracts with an arbitration clause contain a conspicuous warning notice[11] on the front page pre-empted by the Federal Arbitration Act, despite this Court's ruling in Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989) that state arbitration law procedural provisions are enforceable if they do not interfere with the Federal Arbitration Act's policy of enforcing voluntary agreements to arbitrate? The Federal

[11]Montana Code Annotated § 27-5-114(4) requires contracts containing arbitration clauses to contain a conspicuous warning notice on the front page of the contract. The Federal Arbitration Act contains no similar provision. The Montana provision does not prohibit arbitration, but is simply designed to insure voluntary and knowing agreements to arbitrate.

Court Order held the warning notice requirement was pre-empted, a ruling which will be the death knell of state efforts to insure that contracting parties knowingly and voluntarily enter into arbitration agreements.

5. Finally, are general state law prohibitions against forum selection clauses, and clauses limiting the time period for bringing legal action, pre-empted by the Federal Arbitration Act, when those provisions are contained in an arbitration clause? Montana law[12]

[12]The Arbitration Clause requires all legal proceedings between the parties to be filed in the State of Wisconsin (Snap-On's home office) and limits the time for bringing any action to one year. Both provisions are prohibited by Montana law. Montana Code Annotated § 28-2-708; State ex rel Polaris Industries v. District Court, 695 P.2d 471 (Mont. 1985); Trammel v. Brotherhood of Locomotive Firemen and Enginemen, 253 P.2d 329 (Mont. 1953). The Arbitration Clause also permits Snap-On to seek court relief on its only meaningful claims against William, yet requires William to arbitrate all of his claims against Snap-On. Such unilateral remedies are impermissible under Montana law, which requires mutuality of remedy in order to enforce contractual provisions. Montana Code Annotated §§ 28-2-301, 28-2-303; see Boise Cascade Corporation v. First Security Bank of Anaconda, 600 P.2d 173 (Mont. 1979). Despite these clear violations of Montana law, the Federal Court enforced the Arbitration Clause. In that these Montana laws are of "general application" to all contracts, the Federal Court's order conflicts with the holding in Perry v. Thomas, 482 U.S. 483, 492 (1987).

prohibits both types of clauses in all contracts, yet the Federal Court held that the Arbitration Clause was enforceable. This conflicts with the holding of Perry v. Thomas, 482 U.S. 483 (1987) that state laws of application to contracts generally are applicable to arbitration agreements.

CONCLUSION

This Court will accomplish nothing by reviewing the May 27, 1993 State Court Order. It was not final and is now moot. Moreover, 9 U.S.C. § 3 has no bearing on this case.

However, should this Court decide to review any issues, those dealing with the proper role of the federal courts in adjudicating arbitration issues pending before state courts should be addressed. Additionally, the pre-emptive effect of the Federal Arbitration Act over state laws designed to insure voluntary, even-handed

agreements to arbitrate deserves the attention of this Court.

The Petition should be denied. Alternatively, if it is granted, this Court should exercise jurisdiction over the entire arbitration controversy, as framed in the Federal Action and State Action.

Dated this 11 day of November, 1993.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 4 1993
OFFICE OF THE CLERK

No. 93-578

In The

Supreme Court of the United States

October Term, 1993

SNAP-ON TOOLS CORPORATION,
JAMES GOMENDI and STEVE GULLEDGE,

Petitioners,

v.

WILLIAM C. VETTER and
ELAINE LAPOINTE-VETTER,

Respondents.

**Petition For A Writ Of Certiorari
To The Montana District Court For The
Fourth Judicial District, Missoula County, Montana**

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ISSUE

Do the developments summarized herein moot the issue raised by the pending petition for a writ of certiorari?

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.7, petitioners submit this supplemental brief in support of their petition for a writ of certiorari, for the purpose of bringing to the Court's attention intervening matter not available at the time the original petition was filed.

INTERVENING DEVELOPMENTS

On October 8, 1993, the United States District Court for the District of Montana issued an opinion and order (received by counsel the following week) that:

(1) Granted the motion of Snap-on Tools Corporation to compel William Vetter to arbitrate his claims against Snap-on;

(2) Concluded that Snap-on was entitled to an order staying litigation of Mr. Vetter's claims, then pending in the District Court for the Fourth Judicial District, Missoula County, Montana, but declined to order such a stay, expressing the expectation that the state court itself would refrain from proceeding in light of the order compelling arbitration; and

(3) Declined to order arbitration of Mr. Vetter's claims against the individual state court defendants, who were not before the federal court, once again, however, expressing the expectation that the state court would do so.

A copy of the federal court's opinion and order is attached as Exhibit 1.

On October 25, 1993, the District Court for the Fourth Judicial District, Missoula County, Montana issued an opinion and order that:

(1) Compelled William Vetter to arbitrate his claims against the individual defendants;

(2) Stayed litigation proceedings on William Vetter's claims against both the corporate and the individual defendants, pending arbitration;

(3) Denied William Vetter's motion to stay proceedings in an arbitration commenced by Snap-on and the individual defendants; and

(4) Denied the motion of Snap-on and the individual defendants to stay litigation proceedings on the claims of Elaine Lapointe-Vetter pending arbitration.

The state court's opinion makes it clear that it based these rulings on the federal court ruling, that it viewed the matter as discretionary, and that it was deferring to the federal court's disposition of the arbitration issue. A copy of the state court opinion is attached as Exhibit 2.

On October 29, 1993, William Vetter appealed the decision of the United States District Court for the District of Montana to the United States Court of Appeals for the Ninth Circuit. A copy of the notice of appeal is attached as Exhibit 3.

ARGUMENT

These developments do not moot the petition, and in fact emphasize the importance of deciding the issue it raises.

If the Ninth Circuit reverses the federal court decision in Snap-on's favor, there is a strong probability that the state court decision protecting the arbitration rights of Snap-on and the individual state court defendants will itself be vacated, and that the state court will revert to the position it originally took. The issue raised by the petition for a writ of certiorari is therefore still very much alive. Although they have obtained substantial relief (thus far) as a result of the federal court decision, petitioners have a strong, continuing interest in vindication of the contention that they were entitled to the state court relief they sought as a matter of federal law and not as a matter of comity or discretionary deference to a federal court. *See Edward J. DeBartolo Corporation v. N.L.R.B.*, 463 U.S. 147, 153 n.5 (1983).

The baroque procedural maneuvers described above underline the importance of resolving the split of authority over the applicability of 9 U.S.C. § 3 in state court. The parties have now taken their collateral dispute over arbitration to five courts: the state trial court (twice), the Montana Supreme Court, this Court, the United States District Court for the District of Montana, and the United States Court of Appeals for the Ninth Circuit.

A run-of-the-mine business tort claim that an arbitral panel could have disposed of by final and binding award within fifteen to twenty weeks has thus now consumed nine months without making the slightest progress toward resolution on the merits. In the process it has

monopolized substantial judicial resources, thwarted the congressional intent informing the Federal Arbitration Act, and deprived petitioners of key benefits for which Snap-on contracted when it entered into the arbitration agreement with Mr. Vetter.

This Dickensian litigatory waltz has served the interests of neither the parties nor the public. It should not have happened. It can be prevented in the future only by definitive guidance that this Court and this Court alone is in a position to provide.

Dated this 16th day of November, 1993.

Respectfully submitted,

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EXHIBITS

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

* * *

SNAP-ON TOOLS CORPORATION,

Petitioner,

-v-

WILLIAM C. VETTER,

Respondent.

CV 93-34-M-CCL

OPINION AND ORDER

(Filed Oct. 8, 1993)

* * *

A hearing on a petition to compel arbitration and a petition to stay state court proceedings was held October 4, 1993. Jurisdiction is proper under 28 U.S.C. § 1332. For the reasons set forth below, I grant these petitions.

BACKGROUND

On September 11, 1990, Petitioner Snap-on Tools Corporation (Snap-on) and Respondent William C. Vetter (Vetter) entered into a dealership agreement containing a provision for arbitration. On February 24, 1993, Vetter and his spouse, Elaine Lapointe-Vetter, commenced an action in state court in Missoula County, Montana, against Snap-on and against one current employee, Steve Gulledge, and another former employee, James Gomendi. On March 18, 1993, Snap-on filed this action against Vetter in federal court to compel arbitration. On March 22, 1993, Snap-on moved the state court to stay its action pending arbitration.

After argument, the state court denied Snap-on's motion by order dated May 27, 1993. Snap-on sought a writ of supervisory control from the Montana Supreme Court, which was denied on July 27, 1993. Snap-on also appealed the state court order, but on August 31, 1993, the Montana Supreme Court dismissed Snap-on's appeal as interlocutory. On August 11, 1993, Snap-on made a demand for arbitration to the American Arbitration Association, requesting that the arbitration hearing take place in Missoula, Montana. Finally, on September 23, 1993, Snap-on petitioned this court to stay the state court proceeding.

FACTS

On its signature page, the dealership agreement between Snap-on and Vetter provides for arbitration. The arbitration provision consists of three paragraphs, beginning as follows:

> 11. RESOLUTION OF DISPUTES – ARBITRATION. Any controversy or dispute arising out of or relating to this Agreement, including, but not limited to, any claim by the Dealer concerning the entry into, performance under or termination of this Agreement, any claim against an employee, . . . or any claim of breach of the Agreement, shall be submitted to final and binding arbitration as the sole and exclusive remedy for any controversy or dispute.

After operating a Snap-on dealership for approximately nine months, Vetter terminated the dealership agreement on June 6, 1991. William Vetter and Elaine Lapointe-Vetter's suit in state court, filed some twenty months later, alleges intentional and/or negligent representation,

negligence, and interference with economic advantage in connection with William Vetter's signing of the dealership agreement.

DISCUSSION

Petitioner seeks to compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 4.[1] The parties do not contest that the dealership agreement evidences a transaction involving interstate commerce. *See* 9 U.S.C. § 2.

A. Petition to Compel Arbitration.

First, this court must determine whether Snap-on and Vetter agreed to arbitrate the dispute. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87 L.Ed.2d 444 (1985). If the arbitration

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[1] In pertinent part, 9 U.S.C. § 4 states:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 USCS §§ 1 et seq.], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

clause is valid and the claims fall within the scope of the arbitration clause, then the dispute must be submitted to arbitration. In this case, it is clear that Vetter's claims arise out of or are related to his dealership agreement, and thus fall within the scope of the arbitration clause.

Despite the affidavits provided by Vetter, there can be no genuine dispute that the parties agreed to arbitrate this controversy. In Vetter's state court affidavit, dated April 2, 1993, Vetter states that

> [a]t no time did any of them explain to me the significance of the arbitration provision in paragraph 11. . . . At no time did they tell me that I was losing my rights, in the event I had a dispute with Snap-On, (a) to file a case in court, (b) to have a jury determine the facts and decide whether I was entitled to any money from Snap-On, (c) to have legal rules of evidence apply to prevent improper matters from being considered, (d) to appeal to another court from any decision which might be entered, or (e) otherwise to have my dispute handled in court in the normal manner. My understanding at the time was that every citizen had the right to resort to court if he had a dispute. At no time was I advised that any dispute I had with Snap-On had to be arbitrated. . . .

In a similar case where appellant claimed to have been misled by appellee's failure to disclose the meaning and effect of an arbitration clause, the court stated that

> [w]e know of no case holding that parties dealing at arm's length have a duty to explain to each other the terms of a written contract. We decline to impose such an obligation where the language of the contract clearly and explicitly

> provides for arbitration of disputes arising out of the contractual relationship.

Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 287 (9th Cir. 1988). I specifically find that no special relationship or fiduciary duties existed between Snap-on and Vetter. The agreement between the parties indicates that their relationship was based on an arm's length, commercial transaction.

As the Ninth Circuit panel in *Cohen v. Wedbush* further discussed, even if an actual misrepresentation was made regarding the function or effect of the arbitration clause, the misrepresentation could render the contract voidable only if the party had reasonably relied upon the misrepresentation. *Id.* (citing 12 S. Williston, *The Law of Contracts* § 1515B, at 485 (3d ed. 1970)). Such reliance cannot be reasonable when the party could have, "through the exercise of reasonable diligence, ascertained the truth of the matter." *Id.* There can be no unfairness in expecting Vetter to have read the contract he signed. *See id.* Furthermore, the arbitration provision was not hidden from Vetter. It was a large paragraph with a clear subheading in capital letters ("RESOLUTION OF DISPUTES – ARBITRATION") located just inches above Vetter's signature.

In an affidavit prepared just prior to the hearing on the motion to compel arbitration and the petition for a stay of state court proceedings, dated September 29, 1993, Vetter asserts again that Snap-on's employees "never explained to me that the agreements contained a provision which required me to resolve any dispute with Snap-On by arbitration." In addition, however, Vetter asserts

an entirely new claim that "Snap-On's employees led me to believe that, if I had a dispute with Snap-On in the future, I could go to court to resolve that dispute." This vague assertion still does not give rise to a genuine claim of fraudulent inducement of the arbitration provision itself. Besides being inconsistent with Vetter's earlier affidavits and Vetter's statements of fact presented in briefs, this statement is "directly contrary to the specific and unambiguous terms of a written arbitration agreement [and does] not, as a matter of law, state a claim for fraud." *Id.* at 288.

Vetter also argues that the arbitration clause is invalid because it lacks a warning notice mandated by Montana law. Section 27-5-114(4), Montana Code Annotated, requires that all contracts bear a conspicuous warning regarding the arbitration clause.[2] In his brief, Vetter cites *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989), for the proposition that state arbitration law procedural provisions are enforceable if they do not conflict with federal policy. Volt is distinguishable, however, because that arbitration clause was governed by California state law. *Id.* at 477. Here, the arbitration clause provides that it is governed exclusively by the Federal Arbitration Act (FAA) according to the rules of the American Arbitration Association (AAA). Snap-on does not

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[2] The statute provides that "[n]otice that a contract is subject to arbitration *pursuant to this chapter* shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration." 27-5-114(4), M.C.A. (1991) (emphasis added).

seek to compel arbitration under Montana state law but under federal law, which governs this arbitration clause.

Unlike Montana law, federal law imposes no similar warning requirement. Furthermore, the validity generally of an arbitration clause affecting interstate commerce is governed by federal law. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 426 (1983). Relying on the Supremacy Clause (Article 6, clause 2) of the United States Constitution, the United States Supreme Court has held that the FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 858, 79 L.Ed.2d 1, 12 (1984). State law is applicable only for fashioning general contract principles. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 2527 n. 9, 96 L.Ed.2d 426 (1987).

Vetter next argues that the arbitration clause is invalid because it lacks consideration and mutuality of remedy. The subject sentence allows Snap-on to seek "temporary relief from a court including but not limited to an injunction, pending arbitration of any dispute. . . . " However, this provision does not permit Snap-on to litigate whereas Vetter must arbitrate. Rather, Snap-on may seek temporary assistance from a court pending arbitration. For example, this provision allowed Snap-on to present this court with a petition to compel arbitration and a petition for a preliminary injunction. Mutual consideration exists because both Vetter and Snap-on agree to arbitrate "any controversy or dispute arising out of or relating to" the dealership agreement.

Vetter argues too that the entire agreement is void because it was fraudulently induced and also unconscionable. This arbitration provision specifies, however, that disputes relating to the parties' entry into the agreement are to be arbitrated. Thus, arguments striking in this way at the validity of the entire agreement must be submitted to the arbitrator. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-06, 87 S.Ct. 1801, 1805-07, 18 L.Ed.2d 1270 (1967). Additionally, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hospital*, 460 U.S. at 243-25, 103 S.Ct. at 941. Indeed, arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650, 106 S.Ct. 1415, 1419, 89 L.Ed.2d 648 (1986). Thus, all of Vetter's defenses to the dealership agreement may be submitted to the arbitrator for decision.

Finally, Vetter argues that the arbitration provision contains invalid forum selection and limitation of action clauses. The forum selection clauses are not material to this dispute since Snap-on has requested arbitration in the same location as Vetter's litigation and has also designated Montana arbitrators. Vetter may argue to the arbitrators that Montana law nullifies the one year limitation period set forth in the arbitration provision. *See e.g., O'Neel v. National Ass'n of Securities Dealers, Inc.*, 667 F.2d 804, 807 (9th Cir. 1982). This time limitation is a procedural matter best decided by the arbitrator.

Accordingly, the parties entered into a valid agreement to arbitrate the disputes in question and, thus, the

petition to compel arbitration should be granted. The court notes that the arbitration agreement is also valid as to Vetter's claims against Snap-on employees, but the court declines to compel Vetter to arbitrate his claims against third parties who are not before the court. The state court has jurisdiction over the Snap-on employees and may order Vetter to arbitrate those claims.

B. Application for Preliminary Injunction.

Snap-on seeks a stay of William Vetter's state court action. Snap-on does not seek a stay of Elaine Lapointe-Vetter's claims. The stay sought by Snap-on is generally prohibited by the Anti-Injunction Act, 28 U.S.C. § 2283, but three exceptions exist and one exception is applicable in this case. *See Atlantic Coast Lines R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286, 90 S.Ct. 1739, 1742, 26 L.Ed.2d 234 (1970). Under section 2283, "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, *or to protect or effectuate its judgments*." 28 U.S.C. § 2283 (emphasis added).

Because the petition to compel arbitration should be granted, any further proceedings in state court between William Vetter and Snap-on should be stayed as inconsistent with this order. This stay thus falls within the third exception contained in the Anti-Injunction Act, which exception allows this court to protect or effectuate its order compelling arbitration.

To secure a preliminary injunction, the moving party "must show either (1) a likelihood of success on the

merits and the possibility of irreparable injury or (2) the existence of serious questions going to the merits and the balance of hardships tipping in its favor." *Taylor v. Honig*, 910 F.2d 627, 631 (9th Cir. 1990). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *Id.* (citing *Oakland Tribune Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985)). Snap-on has presented the court with the parties' agreement to arbitrate any dispute relating to their dealership agreement and evidence that Vetter has attempted to litigate a dispute within the scope of the arbitration agreement. Thus, Snap-on has shown a likelihood of success on the merits and the possibility of the irreparable harm of losing the benefits of its arbitration agreement.

Vetter's motion to stay arbitration, dated September 30, 1993, is made upon the ground that Vetter will be irretrievably damaged if a court does not determine the validity of the arbitration clause and the scope of its coverage. Vetter argues that he will be irretrievably damaged if forced to arbitrate because he cannot afford to do so. The court finds that Vetter has already received the sought-after judicial determination of the validity of the arbitration clause and the scope of its coverage, and that inability to pay for arbitration as opposed to litigation does not rise to the level of irretrievable damage.

Snap-on is entitled to its requested relief staying state court proceedings pending the arbitration. However, because this court assumes, in light of the above, that neither Vetter nor the state court system will proceed further, no formal stay or injunction seems necessary. Out

of deference to and respect for the state court, therefore, none will enter at this time.

Accordingly,

IT IS HEREBY ORDERED that Snap-on's motion to compel arbitration is GRANTED.

IT IS FURTHER ORDERED that William C. Vetter shall submit to arbitration his claims against Snap-on which are currently pending in Cause No. 77498 in the District Court of Missoula County.

IT IS FURTHER ORDERED that Snap-on's petition for injunctive relief related to Cause No. 77498 in the District Court of Missoula County is GRANTED, but no formal order need enter at this time.

IT IS FURTHER ORDERED that Vetter's motion to stay arbitration is DENIED.

The clerk is directed forthwith to notify counsel of entry of this order.

Done and dated this 8th day of October, 1993.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

EXHIBIT 2

John W. Larson, District Judge
Fourth Judicial District Dept. 3
Missoula County Courthouse
200 West Broadway
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MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY

WILLIAM C. VETTER, an individual, and ELAINE LAPOINTE-VETTER, an individual, Plaintiffs, vs. SNAP-ON TOOLS CORPORATION, a corporation; JAMES GOMENDI, an individual; and STEVE GULLEDGE, an individual, Defendants.	Cause No. 77498/49 OPINION AND ORDER (Filed Oct. 25, 1993)

Pending before the Court are (1) Plaintiff William Vetter's Motion to Stay Arbitration and for Partial Summary Judgment, and (2) Defendants' Motion to Compel Arbitration and for Reconsideration of Motions to Stay Proceedings Pending Arbitration of Claims. The briefing having been completed and a hearing having been held on October 20, 1993, the motions are now ready for decision.

Plaintiff William Vetter's ("William") Motion to Stay Arbitration and for Partial Summary Judgment was filed on September 23, 1993. Since the filing of William's motion, however, Judge Lovell of the U.S. District Court for the District of Montana has issued an Opinion and Order finding that the arbitration clause at issue in this case is valid and enforceable by Defendant Snap-On Tools Corporation ("Snap-On") against William. *See* Opinion and Order, CV 93-34-M-CCL, filed Oct. 8, 1993.

This Court defers to the Opinion and Order of the U.S. District Court, and therefore finds that William's motion has been made moot by the U.S. District Court's decision. This Court therefore denies William's Motion to Stay Arbitration and for Partial Summary Judgment.

Defendants' Motion to Compel Arbitration and for Reconsideration of Motions to Stay Proceedings Pending Arbitration of Claims requests this Court for (1) an order compelling William to arbitrate his claims against Defendants James Gomendi ("Gomendi") and Steve Gulledge ("Gulledge"); (2) reconsideration of this Court's denial of a stay of the proceedings by William against Snap-On; and (3) reconsideration of its denial of a stay of the proceedings by plaintiff Elaine LaPointe-Vetter ("Elaine") against all of the Defendants. The Court will address each request in turn.

William's Claims Against Defendants Gomendi and Gulledge

Defendants argue that this Court must issue an order compelling William to arbitrate his claims against Gomendi and Gulledge because the U.S. District Court in

its Opinion and Order stated that "[t]he court notes that the arbitration agreement is also valid as to Vetter's claims against Snap-On's employees, but the court declines to compel Vetter to arbitrate his claims against third parties who are not before the court. The state court has jurisdiction over the Snap-On employees and may order Vetter to arbitrate those claims." Opinion and Order at 10. The Court has jurisdiction to order arbitration under the Federal Arbitration Act. *Passage v. Prudential-Bache Securities, Inc.*, 223 Mont. 60, 65, 727 P.2d 1298, 1300 (1986).

As a preliminary matter, the Court notes that the U.S. District Court stated that this Court *may*, not *must*, order William to arbitrate his claims against Gomendi and Gulledge. The U.S. District Court has not ordered this Court to do anything, and the decision on whether to compel William to arbitrate his claims against Gomendi and Gulledge is solely this Court's decision to make.

Nevertheless, as stated above, this Court defers to and accepts the U.S. District Court's determination that the arbitration clause at issue in this case is valid and enforceable. That clause (para. 11 of the franchise agreement) states that "any claim against an employee . . . of [Snap-On] shall be submitted to final and binding arbitration. . . . "

There is no dispute that Plaintiffs are suing Gomendi and Gulledge as employees of Snap-On. Plaintiffs' complaint against the Defendants at paragraph 3 specifically alleges that Gomendi and Gulledge "were, at all times material to this action, agents and employees of Snap-On. . . . " The complaint further alleges that

> in performing the acts and omissions alleged below, each Defendant was acting as the employee and/or agent of each other Defendant, each Defendant performed said acts and omissions within the course and scope of his/her employment and/or agency with the other Defendants and with the full permission and knowledge of the other Defendants, and the other Defendants authorized and/or ratified all acts and omissions of each other Defendant, as alleged below, pursuant to said employment and/or agency.

Complaint, para. 5.

Because Plaintiffs have sued Gomendi and Gulledge as employees and agents of Snap-On, and because the U.S. District Court has determined the arbitration clause to be valid and binding with respect to William, this Court holds that William, in accordance with the arbitration clause, must arbitrate his claims against Gomendi and Gulledge as employees of Snap-On.

Plaintiffs argue that Defendants have offered no new information since this Court declined to stay Plaintiffs' proceedings against Defendants on May 27, 1993, and that this Court should not reconsider its prior ruling. However, Judge Lovell's ruling that the arbitration clause is valid is in fact very significant new information. At the time of its May 27, 1993, Order, this Court did not yet know whether or not the arbitration clause was valid. Now that the clause has been determined to be enforceable with respect to William and Snap-On, it is by its terms also enforceable with respect to William and Snap-On's employees Gomendi and Gulledge.

The Court therefore orders William to arbitrate his claims against Gomendi and Gulledge, and stays William's proceedings against Gomendi and Gulledge in this Court pending the outcome of the arbitration.

Stay of Proceedings by William Against Snap-On

Defendants have moved this Court for reconsideration of its May 27, 1993, denial of Defendants' motion to stay William's proceedings pending arbitration of his claims pursuant to the arbitration clause. The Court denied the Defendants' earlier motion to stay proceedings on the grounds that the Vetters had stated claims that might not be subject to the arbitration clause, and that the validity of the clause was not yet clear. The U.S. District Court has now decided, however, that the arbitration clause is valid and does apply to all of William's claims against Snap-On, and has ordered William to submit his claims against Snap-On to arbitration. This Court defers to the judgment of the U.S. District Court.

This Court therefore hereby grants Defendants' motion for a stay of William's proceedings against Snap-On pending the outcome of the arbitration proceedings.

Stay of Proceedings by Elaine Against All Defendants

Defendants seek a reconsideration of this Court's May 27, 1993, denial of their motion to stay Elaine's proceedings against all Defendants on the grounds of judicial efficiency. Defendants argue that Elaine may not need to litigate her claims if William wins the arbitration, and that a win by Defendants at arbitration may have a

preclusive effect on Elaine under principles of res judicata and collateral estoppel, presumably because Defendants assert that Elaine's claims are derivative of her husband's.

Whether to grant a stay of proceedings pending the outcome of another proceeding lies within the Court's discretion. *See e.g., Lewis v. Multree,* 627 P.2d 94, 96 (Utah 1981); *Wood v. Millers Nat'l Ins. Co.,* 632 P.2d 1163, 1166 (N.M. 1981); 1 Am. Jur. 2d *Actions* § 97. Specifically, whether to stay litigation by a nonarbitrating party pending the outcome of an arbitration is in the discretion of the Court. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 20 n.23 (1982). The Court should grant a stay only when the two proceedings involve an identity of parties and causes of action. *See e.g., Corinthian Pool Corp. v. National Northeast Corp.,* 492 F. Supp. 928 (D.N.H. 1980); *Culbertson v. Midwest Uranium Co.,* 132 F. Supp. 678 D. Utah 1955); 1 Am. Jur. 2d *Actions* § 97.

It is undisputed that Elaine did not sign the franchise agreement, that she is not subject to the arbitration clause, and that she will not be a party to the arbitration proceeding. Moreover, it is apparent from Elaine's affidavit of September 29, 1993, that Defendants made representations directly to Elaine and that Elaine invested her own money in the Snap-On franchise. Elaine thus has claims against Defendants separate from those of her husband that will not be adjudicated at the arbitration because Elaine will not be a party to the arbitration. Therefore, regardless of the outcome of the arbitration, Elaine will still have claims against Defendants that can be addressed only in this Court. A stay of Elaine's proceedings in this Court is therefore not appropriate.

Defendants urge this Court to stay Elaine's proceedings because a win by Defendants at arbitration may have a preclusive effect on Elaine under principles of res judicata and collateral estoppel. Defendants have, however, presented no authority for this assertion, and the Court has found none.

Both the doctrines of res judicata and collateral estoppel require that the party against whom the doctrine is asserted have been a party to the prior proceedings and that the issue against which the doctrine is asserted have been finally adjudicated in the prior action. *See, e.g., Demers v. Roncor, Inc.*, 249 Mont. 176, 182, 814 P.2d 999 (1991) (criteria for application of res judicata); *Smith v. Schweigert*, 241 Mont. 54, 58, 785 P.2d 195 (1989) (elements of collateral estoppel).

Moreover, equitable estoppel may not require a wife to be bound by the outcome of a prior proceeding against her husband where the wife was not a party to the prior proceeding. *See Smith v. Schweigert, sura,* [sic] 241 Mont. at 59.

Given that Elaine will not be a party to the arbitration between William and Defendants, it is readily apparent that her cause of action against Defendants most likely will not be precluded by res judicata, collateral estoppel, or equitable estoppel.

Therefore, the Court denies Defendants' motion to stay Elaine's proceedings against the Defendants and for a protective order pending the outcome of William's arbitration proceeding. Elaine's proceedings against Defendants shall proceed in accordance with the schedule agreed upon in the Scheduling Order dated September

21, 1993. Defendant's motion for a protective order is granted with respect to Williams' claims.

Accordingly, the Court

(1) denies William's motion to stay arbitration and for partial summary judgment;

(2) grants Defendants' motion to compel William to arbitrate his claims against Gomendi and Gulledge;

(3) grants Defendants' motions for protective order and to stay William's proceedings against Snap-On, Gomendi and Gulledge in this Court pending completion of arbitration; and

(4) denies Defendants' motions for protective order and to stay Elaine's proceedings against the defendants, and orders the proceedings to adhere to the schedule set forth in the Scheduling Order dated September 21, 1993.

DATED this 25th day of October, 1993.

/s/ John W. Larson
JOHN W. LARSON
District Judge

cc: Donald V. Snavely
Paul J. Petit

EXHIBIT 3

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Attorneys for Respondent

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
MISSOULA DIVISION

SNAP-ON TOOLS CORPORATION, Petitioner, -vs- WILLIAM C. VETTER, Respondent.	)	Case No. CV 93-34-M-CCL

NOTICE OF APPEAL
(Filed Oct. 29, 1993)

NOTICE IS HEREBY GIVEN that William C. Vetter, the Respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the following orders:

1. Opinion and Order filed on October 8, 1993, which granted Petitioner's Motion to Compel Arbitration and Petitioner's Petition for Injunctive Relief and denied Respondent's Motion to Stay Arbitration; and

2. Order filed on September 27, 1993, which denied Respondent's Motion to Dismiss for Lack of Jurisdiction and for Rule 11 Sanctions.

SNAVELY LAW OFFICES
Attorneys for Respondent
William C. Vetter

DATED: 10/29/93

By: /s/ Don Snavely
Donald V. Snavely
Snavely Law offices [sic]
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DECLARATION OF SERVICE BY MAIL

Vida Long declares as follows:

I am an employee of the attorney of record for Respondent in this action. On October 29, 1993, I served a complete copy of the foregoing document on each attorney/party of record in this action by depositing the same in the United States Mails, at Missoula, Montana, in a separate envelope with the postage prepaid thereon, first class mail, addressed to each of the persons indicated below:

Person Served	Party Represented
Paul J. Petit Attorney at Law 195 Fairway Drive Missoula, MT 59803 Co-counsel for Petitioner	Petitioner, SNAP-ON TOOLS CORPORATION

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Co-counsel for Petitioner

Petitioner,
SNAP-ON TOOLS
CORPORATION

EXECUTED on October 29, 1993 at Missoula, Montana.

/s/ Vida Long
Vida Long